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JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 170.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Plaintiff in Error*,

vs.

BARBER ASPHALT PAVING COMPANY, THE CITY OF LOUISVILLE, *Defendants in Error*.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Defendants in Error.

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Brief for Defendants in Error.

The Kentucky statutes governing special taxation for local improvements provide that the cost of constructing public ways shall be assessed against the lots in quarter squares contiguous to the improvement, and equally apportioned within such district according to the square feet contained in each lot. A "square" is defined as being a subdivision of territory bounded on all sides by principal streets. In the appendix to this brief will be found the statutes in full. The plan of assessment prevailing in Kentucky is commonly designated as the area rule, and has been in effect since the organization of the Commonwealth. The legislature designates the district presumed to be benefited, and all lots within the district are required to pay their proportionate part of the cost of the improvement. The plan is both certain and fair, and in its ultimate application works an equality characteristic of no other system of assessment.

In Kentucky the original construction of public ways is alone the subject of special assessment, all reconstruction and repairs being made by the municipality, and paid out of general taxes collected for the purpose. Since public improvements have been known to Kentucky, their initial cost has been paid by the quarter square method of taxation, and to alter or amend the rule at this time would produce such injustice upon those property holders who have heretofore been required to improve adjacent public ways, that this Court, under any circumstances, would be slow to declare that a different scheme must be adopted. In addition property values have been adjusted on the basis of the tax as heretofore imposed. Purchases of real estate, whether by contract of parties or condemnation in Court, have at all times been made at a figure, larger or less, according as the adjacent streets have been improved and paid for or are yet to be constructed and the cost taxed against the property.

The power exercised by the Kentucky Legislature in the enactment of its laws regulating special assessments has been repeatedly approved by this Court as in accord with the Constitution of the United States and the amendments thereto. So many announcements on the subject have gone forth from this Court, that it would seem to be settled beyond denial or dispute that a legislature may designate the district to be assessed for local public improvements, and having so acted, its determination respecting benefits to the land within the district prescribed is final and conclusive. The legislative ascertainment of benefit is controlling upon courts just as the findings of commissioners are held to be, when the legislature delegates the power of deciding the matter of benefit to a special board or commission.

These familiar principles are so fixedly established as to merit the description of legal postulates. They have been recognized and enforced with such unanimity as to make it a source of surprise that at this day their correctness should be questioned or their application resisted.

Not only has the general plan of special assessment prevailing in Kentucky been repeatedly sustained as constitutional by this Court, but the very statutes here under consideration have

been examined and a decision thereon rendered, upholding the enactments of the Kentucky Legislature as well within its constitutional powers.

The plaintiff in error first attacks the Kentucky system in general, and then assails the application of the plan to what adversary counsel is pleased to term "the peculiar case at bar." This description of the case is certainly maladroit. It can be peculiar only in elements that would strengthen the justice and propriety of the special assessment claimed by plaintiff in error to be unconstitutional.

The Court of Appeals of Kentucky, in its decision of this case, held that the tax, in accordance with the well settled law of the State, has been imposed, not upon the special use or limited estate to which the property is subject in the hands of the Louisville & Nashville Railroad, but has been laid upon the lot of land within the taxing district just as is the case with every other lot within the territory liable to assessment. So that if it be not true that the perpetual right of way of a railroad company consumes the entire title to the real estate, and is therefore not a lot within the Kentucky assessment statutes, it still remains an uncontrovertible fact that the right of way, together with the servient estate, does constitute a lot, and every possible interest in the land has been put in lien by the assessment claim. It is the real estate within the district, irrespective of the presence of the plaintiff in error or any peculiar occupation of the premises, that has been assessed in this case and is involved by these proceedings.

A sure and easy escape from every form of special taxation is afforded by the argument of plaintiff in error. If land ceases to be such on account of easements imposed upon it; if a lot is not a lot when a railroad right of way exists in connection with it, then a property holder need only enjoy his estate in a peculiar way to produce complete exemption from the burdens of local taxation.

It is to be remembered that if the land here involved is released from the assessment now in controversy, it can at no future time be called upon or required to contribute to the cost of improving the adjacent street. In a day or a month hence

the special use may have ceased and the easement no longer exist, yet all reconstruction and repairs of the street are borne by a general tax.

It is nowhere contended that the land aside from the purpose to which it happens at this time to be employed would and does not receive the same measure of special benefit as results to other lots within the district subject to the tax; nor is it argued that other lots have not been benefited by the improvement.

II.

The argument of plaintiff in error, on which a reversal of the decision of the Court of Appeals of Kentucky is asked, rests upon a manifest illogical method of reasoning. It seems to be admitted by counsel representing plaintiff in error that a legislative determination of benefit and a plan of special assessment based thereon, is not repugnant to the Fourteenth Amendment of the Federal Constitution. It is not contended that the area or square foot method of assessing the cost of local improvements conflicts with any provision, either of the Kentucky State Constitution or the Constitution of the United States. On the contrary, plaintiff in error is forced to concede that the decisions of this Court have long since settled the doctrine that the legislature may exercise a discretion and determine the district presumed to be benefited by a local improvement.

It is, however, contended by plaintiff in error that after such legislative determination, the Courts can and must try any complaint setting up lack of benefit. And here occurs what seems to us to be bad law and worse logic. It is a contradiction in terms, to say that the legislature of a state may prescribe the tax district to be assessed for the cost of a local improvement, and at the same time to contend that each individual property holder within the limits fixed by the legislature may try in court the question of whether or not his particular, individual portion of property has received benefits in exact proportion to the amount of taxes imposed. Nothing remains of the legislative power and its exercise, if the Courts are to decide what benefit or lack of benefit has resulted to each lot.

The application of such a scheme of apportioning local tax-

ation as is presented by the argument of plaintiff in error leads to a palpable absurdity. The legislature exercising a power conceded by adversary counsel to be proper, fixes the territory liable for the cost of a public improvement by designating a certain district contiguous to the improvement. The tax levied in accordance with such a plan has been uniformly sustained, upon the idea that the legislature need not delegate the ascertainment of benefit to a special tribunal, but may decide for itself the property to be benefited. After designating the district benefited, an apportionment of the cost must be made upon all property within the limits defined. After such proceedings have been taken, it cannot be allowed to the several individual lot owners to invoke the interposition of a court in challenging the correctness of the amount assessed against their property. To tolerate such proceedings on the part of property holders, means to release such parties as have not received a full measure of benefit for every dollar of tax, and at the same time deprive the state or municipality of the right to recoup by additional assessments upon persons and property receiving benefits in excess of the amount charged against them.

From this manifest injustice to the taxing authority, necessarily arises the rule that one plan or the other must be adopted in placing the burdens of special taxation; either the legislature must constitute a board or body to hear and determine all questions of benefits arising from local improvements and levy an assessment in accordance with its findings, or the legislature must itself determine the property benefited and conclusively fix the amount of the tax which each parcel of real estate must bear. No combination of the two systems, such as the plaintiff in error contends for, is capable of safe or satisfactory application, and no legislature has ever adopted such a rule, and no court has ever sanctioned such a plan.

III.

In French vs. Barber Asphalt Paving Company, 181 U. S., 324, this Court attemped to put at rest all discussion and debate relative to the scope of the decision in Norwood vs. Baker, 172 U. S., 269. Language in that opinion gave inspiration for the

argument that Norwood vs. Baker held as void any plan of assessment not based upon special benefits to be determined by tribunals organized for such purpose. French vs. Barber Asphalt Paving Company was intended to and did decide that Norwood vs. Baker went no further than the facts of the case justified a ruling. No one has ever doubted the correctness of the Court's decision in holding that the City of Norwood could not take from Mrs. Baker a valuable portion of her property, assume to pay her for the estate employed for public purposes, and then force a return of the purchase price, and incidental costs, by the imposition of an alleged tax. Radically different is that announcement of legal rights from a decision holding unconstitutional systems of special assessment in vogue in a majority of the states of the Union and declaring invalid claims of many millions of dollars, the result of work done and money expended, on the idea that taxing laws which have existed since the organization of this government, were not in violation of the Federal Constitution.

In French vs. Barber Asphalt Paving Company, this Court is particular to affirm and reaffirm the validity of those systems of taxation in which the legislature, determining finally and conclusively the question of benefits, prescribes the tax territory to contribute to the cost of local improvements.

> "The legislature may commit the ascertainment of the sum "to be raised and of the benefited district, to commissioners, "but it is not bound to do so, and may settle both questions "for itself, and when it does so, its action is necessarily con- "clusive and beyond review."
>
> "The question of special benefit and the property to which "it extends, is of necessity a question of fact; and when the "legislature determines it in a case within its general power, "its decision must of course be final."
>
> "The legislature has the power to determine what lands "which might be benefited by the improvement are in fact "benefited, and if it does so, its determination is conclusive "upon the owners and the Courts, and the owners have no "right to be heard on the question whether their lands are "benefited or not, but only upon the validity of the assess-

"ment and its apportionment among different parcels of the "class which the legislature has conclusively determined to "be benefited."

"The legislature has power to fix a district for itself with- "out any hearing as to benefits, for the purpose of assessing "upon the lands within the district the cost of a local public "improvement. The legislature, when it fixes the district "itself, is supposed to have made proper inquiry and to have "finally and conclusively determined the fact of benefits to "the land included in the district, and the citizen has no con- "stitutional right to any other or further hearing upon that "question."

"The rule of apportionment among the parcels of land ben- "efited also rests within the discretion of the legislature, and "may be directed to be in proportion to the position or front- "age or area or market value of the land or in proportion to "the benefits as estimated by the Commissioners."

All of these statements of law are sanctioned by this Court in French vs. Barber Asphalt Paving Company, and in the light of their plain and positive declaration of principle, it is quite remarkable that counsel for plaintiff in error should represent that in no case has this Court either decided or intimated that a property holder would not be heard in every instance where he had not received one hundred cents of benefit for every dollar of tax.

IV.

The opinion in French vs. Barber Asphalt Paving Company is supported by an abundance of authorities previously emanating from this Court.

"That whenever by the laws of a state or by state authority "a tax, assessment, servitude or other burden is imposed "upon property for the public use, whether it be of the whole "State or of some more limited portion of the community, "and those laws provide for a mode of confirming or con- "testing the charge thus imposed in the ordinary course of "justice, with such notice to the person or such proceedings "in regard to the property as is appropriate to the nature of "the case, the judgment in such proceeding cannot be said

"to deprive the owner of his property without due process of "law, however obnoxious it may be to other objections."

"It is said that part of the property of plaintiff assessed "is not benefited by the improvement. But this is a matter of "detail with which this court cannot interfere, if it were clear- "ly so; but it is hard to fix a limit within these two parishes "where property would not be benefited by the removal of "the swamps and marshes, which are within their bounds." (Davidson vs. New Orleans, 96 U. S., 97.)

"It may be that the burden laid upon the property of com- "plainants is onerous. Special assessments for special road "or street improvements very often are oppressive. But that "the legislative power may authorize them and may direct "them to be made in proportion to the frontage, area or mar- "ket value of the adjoining property, at its discretion, is under "the decisions no longer an open question." (Mattingly vs. District of Columbia, 97 U. S., 687.)

"When the determination of the lands to be benefited is "entrusted to commissioners, the owners may be entitled to "notice and hearing upon the questions whether their lands "are benefited and how much. But the legislature has the "power to determine, by the statute imposing the tax, what "lands, which might be benefited by the improvement, are in "fact benefited; and if it does so, its determination is con- "clusive upon the owners and the courts, and the owners "have no right to be heard upon the question whether their "lands are benefited or not, but only upon the validity of "the assessment, and its apportionment among the different "parcels of the class which the legislature has conclusively "determined to be benefited.

"In determining what lands are benefited by the improve- "ment the Legislature may avail itself of such information as it "deems sufficient, either through investigation by its com- "mittees, or by adopting as its own the estimate or conclusions "of others, whether those estimates or conclusions previously "had or had not any legal sanction." (Spencer vs. Merchant, 125 U. S., 345.)

"By this legislation a comprehensive system regulating "the supply of water and the erection and maintenance of "reservoirs and water mains was established, and of this "legislation every property owner in the District must be pre- "sumed to have notice. And, accordingly, when by the Act "of August 11, 1894, Congress enacted that thereafter assess- "ments levied for laying water mains in the District of Colum-

"bia should be at the rate of one dollar and twenty-five cents "per linear foot against all lots or land abutting upon the "street, road, or alley in which a water main shall be laid, "such an act must be deemed conclusive alike of the question "of the necessity of the work, and of the benefits as against "abutting property. To open such questions for review by "the courts on the petition of any or every property holder "would create endless confusion." (Parsons vs. District of Columbia, 170 U. S., 45.)

"Assume that the only theory of these assessments for "local improvements upon which they can stand is that they "are imposed on account of the benefits received, and that "no land ought in justice, to be assessed for a greater sum "than the benefits received by it, yet it is plain that the fact "of the amount of benefits is not susceptible of that accurate "determination which appertains to a demonstration in "geometry. Some means of arriving at this amount must be "used, and the same method may be more or less accurate in "different cases involving different facts. Some choice is to "be made, and where the fact of some benefit accruing to all "the lands has been legally found, can it be that the adoption "of an ad valorem method of assessing the lands is to be held "a violation of the Federal Constitution? It seems to us "clearly not. It is one of those matters of detail in arriving "at the proper and fair amount and proportion of the tax that "is to be levied on the land, with regard to the benefits it "has received which is open to the discretion of the state "legislature, and with which this Court ought to have noth- "ing to do. The way of arriving at the amount may be in "some instances inequitable and unequal, but that is far from "rising to the level of a constitutional problem and far from "a case of taking property without due process of law." . . .

"In Walston vs. Nevin, 128 U. S., 578, an assessment was "laid upon lands for benefits received from construction of a "local improvement, according to the number of square feet "owned by the land owner. It was urged that it was not an "assessment governed by the amount of benefits received, "but was an absolutely arbitrary and illegal method of as- "sessment. This Court held the objection not well founded "and that the matter was for the decision of the legislature "to which body the discretion was committed, of providing for "the payment of the improvement."

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

V.

French vs. Barber Asphalt Paving Company has been followed by a number of adjudications subsequently made in this Court. In the same volume in which the opinion in the case just mentioned appears, there is also to be found Wight vs. Davidson, p. 371; Tonawanda vs. Lyon, p. 389; Webster. vs. Fargo, p. 394; Cass Farm Company vs. Detroit, p. 396; Detroit vs. Parker, p. 399.

The following extracts are from the later cases:

"The case of Norwood vs. Baker presented, as the judge "in the court in the present case well said, 'considerations of "peculiar and extraordinary hardships,' amounting, in the "opinion of a majority of the judges of this court, to actual "confiscation of private property to public use, and bringing "the case fairly within the reach of the Fourteenth Amend-"ment.

"The facts disclosed by the present record do not show any "abuse of the law, nor that the burdens imposed upon the "property of the complainant were other than those imposed "upon other persons in like circumstances." (Tonawanda vs. Lyon.)

"We have recently held that it was not the intention of "the Fourteenth Amendment to subvert the systems of the "states pertaining to general and special taxation; that that "amendment legitimately operates to extend to the citizens "and residents of the state the same protection against arbi-"trary state legislation affecting life, liberty and property as "is afforded by the Fifth Amendment against similar legisla-"tion by Congress, and that the federal courts ought not to "interfere when what is complained of is the enforcement of "the settled laws of the state applicable to all persons in like "circumstances and conditions, but only when there is some "abuse of law amounting to confiscation of property or de-"privation of personal rights as was instanced in the case of "Norwood vs. Baker." (Cass Farm Co. vs. Detroit.)

In King vs. Portland City, 184 U. S., 61, the following quotation is made by the Court with approval:

"But we are inclined to believe that the better doctrine "deducible from adjudged cases, including those of the Su-"preme Court of the United States, is that the assessment

"will be upheld whenever it is not patent and obvious from "the nature and location of the property involved, the dis- "trict prescribed, the condition and character of the improve- "ment, the cost and relative value of the property to the as- "sessment, that the plan or method adopted has resulted in "imposing a burden in substantial excess of the benefits or "disproportionate within the district as between owners."

Plaintiff in error seizes upon this utterance as sustaining the contention that each specific and individual tax claim must rest upon benefits derived. The citation does not seem to admit of such construction. The district designated by the legislature is presumed to be benefited. That presumption is conclusive in the absence of anything showing that from the nature and location of the property involved, and the character of the improvement, no benefit to the district could possibly accrue. The only remaining character of attack on an assessment resulting from a legislative ascertainment of benefit must be based upon proof that the apportionment between owners within the district has been disproportionate, and therefore unfair. Such are apparently the propositions to be deduced from King vs. Portland as quoted.

In Chadwick vs. Kelley, 187 U. S., 540, this court held the following views "to be consonant with the great weight of authority, both state and federal:"

"It is too late to question the right of the general assembly "to establish particular districts for the attainment of special "local public good, through works of a particular character, "and to order itself, or authorize some political body to order, "special assessments to be made within the district for the "purpose of meeting the costs and expenses of such works. "It is true that in some instances almost the whole benefit "accrues to a few, but there can be no universal rule of justice "upon which such assessment can be made. An apportion- "ment of the costs that would be just in one case would be "oppressive in another. For this reason, the power to de- "termine when a special assessment shall be made and on "what basis it shall be apportioned, rests in the legislature "or some political body to which it has delegated that author- "ity." . . . . . .

"It cannot be exacted, for the purpose of sustaining the "constitutionality of a statute or ordinance authorizing a work "of local public improvement at the cost of abutting owners, "that it be shown there is a benefit in every possible respect "to the particular owners, nor that the benefit be direct and "immediate. The general assembly has conferred upon the "common council the right and power to constitute any par- "ticular street, which it proposes to pave, a special taxing dis- "trict for the purpose of meeting the cost of making such pav- "ing. It has exercised this right and power in the matter of "paving Hagan Avenue. Having done so, the legislature it- "self has designated how, in what proportion, and by what "standard this cost is to be met. The council was not at "liberty to depart from this apportionment. The judiciary "is not authorized to alter it and to substitute for a fixed "legislative standard a fluctuating judicial standard based "upon actual benefits received and measured by values or en- "hanced values to be established by evidence and proof."

In the light of this very strong declaration of the law, it is quite remarkable that counsel for plaintiff in error is unable to find anywhere a retraction of Norwood vs. Baker, as construed by him, holding unconstitutional any plan of distributing local taxation other than special benefits for each and every specific parcel of property concerned in the tax.

In Seattle vs. Kelleher, 195 U. S., 351, we have the last ruling of this Court on the question here at issue, and with this as the epitome of the Court's decision:

"It was within the power of the legislature to create or to "authorize the creation of special taxing dictricts, and to "charge the cost of a local improvement upon the property "in such a district by frontage."

Webster vs. Fargo, 181 U. S., 394; French vs. Barber Asphalt Paving Company, 181 U. S., 324; McNamee vs. Decoma, 24 Wash., 591; Cooley, Constitutional Limitation, 729.

The facts of the last mentioned case are doubtless remembered by the Court. It was contended by the appellee, the decree being reversed, that it was "grossly unnecessary and unjust to include a vacant, unoccupied tract in a district which was to bear the expense of planking, when that planking was extended only along the settled portion of the street, and was

to stop a thousand feet from the tract vacant and wild." Norwood vs. Baker was relied upon as sustaining the decision of the lower court. Its application to the question involved was denied by this Court.

The assessment challenged as unconstitutional in the case now submitted is but the enforcement of the settled laws of Kentucky applied, since the origin of the state, to all persons in like circumstances and under similar conditions.

VI.

As illustrating the unbroken line of adjudication in the Kentucky Court of Appeals, the following quotations are made:

The opinion in City of Lexington vs. McQuillan's Heirs, 9 Dana, 39 Ky., 513, was rendered by Judge Marshall in 1839, and furnishes an exhaustive and learned treatment of the question. A portion is extracted:

> "When taxes are levied, therefore, they must be imposed "on the public in whose name and for whose benefit they are "required, and to whom those who impose them are respon-"sible. And although there may be a discrimination in the "subjects of taxation still persons in the same class and "property of the same kind must generally be subjected alike "to the same common burden. This alone is taxation, accord-"ing to our notion of constitutional taxation in Kentucky.
>
> "The city council, representing, as it does, the whole con-"federation of squares, may be deemed the representatives of "each square, in some such sense as that in which the jus-"tices appointed by the Commonwealth may be considered "as the representatives of the interest and public will of the "people of any county. Graded and paved streets are com-"mon in Lexington and should be desired and expected in "such a city, by all the citizens; and each square being made "liable for the cost incident to its own streets and sidewalks, "under the control of the unanimous city council, though the "burthen on one square may sometimes exceed that of an-"other—yet there appears to be amongst them all, as much or "nearly as much, reciprocity as that which exists in a similar "respect, among the several counties of the States.
>
> "As all the streets and sidewalks may be expected to be "improved at some time, in a manner substantially the same—"the principal question decided by the council in this case, "was only as to the time when those opposite to the square

"including the lot of McQuillan's heirs should be improved. "The County Court decided similar questions without ob- "jection to their power, or the validity of their decision.

"All the streets have been made many years prior to the "incorporation of the city; most of them had been graded "and paved prior to the year 1826, and always in the mode "now objected to, as unconstitutional. Other cities in the "United States, as well as Europe, have been improved in a "similar manner; this mode and this usage, in towns and "cities, may have been generally understood when our con- "stitution was adopted; the 11th section of the charter of Lex- "ington only re-enacted what had been the established rule "respecting its streets and sidewalks; the citizens were famil- "iar with that rule, and, thus, understanding it, they accepted "the charter as it is. In Louisiana, South Carolina, and "Pennsylvania the judiciary has sanctioned, as constitntional, "the application of the same or a similar principle to the "streets and sidewalks of cities of those states, respectively; "in New York and Massachusetts, it has been virtually recog- "nized by the state courts, and it has been declared uncon- "stitutional by no court, so far as we have been able to ascer- "tain."

In 1841 the Court of Appeals, by Chief Justice Robertson, decided the case of City of Louisville vs. Hyatt, reported in 2 Ben Monroe, 177. The following is quoted:

"We do not feel inclined, therefore, to retract or essen- "tially qualify the opinion in the case of the City of Lexing- "ton vs. McQuillan's Heirs, neither subsequent reflection nor "argument, having, in any degree, shaken our judgment as "to the correctness of it.

"In that opinion we suggested that, so far as improvements "of streets may be concerned, the charter had virtually sub- "divided the city into subordinate quasi municipalities or "communities, each consisting of the lot holders in a defined "square,—and is not this substantially true? Does not the "charter of each of the cities of Louisville and Lexington "authorize 'the owners of a majority of lots or parts of lots "fronting on any square' to require the improvement of any "street bounding their square, at the expense of all the own- "ers of ground, on their portion of that street and also author- "ize the mayor and council, by unanimous vote in council, to "make the like improvement of fractions of streets by squares "at the like distributive cost of the local proprietors? And in "this anomalous provision, in one aspect of it so democratic

"and in the other so carefully guarded against oppression or "gross injustice, we have been unable to perceive any suf- "ficient ground for deciding that the fundamental law of the "state had been violated; and we presume that, in the prudent "exercise of this police authority, unreasonable inequality of "burthen will rarely, if ever, be imposed, considering the past "and prospective improvement of the several squares in the "same prescribed mode.

"And, in opinion, the learned chancellor (of the Circuit), "in criticising, as he was pleased to do, the suggestion as to "the subdivision, as just defined, of the aggregate municipal- "ity, and characterizing such a corporation as Briarian, "thought fit to illustrate his conviction of its absurdity, in "the following manner: 'But as the giant Briarius of fifty "heads!! was buried under Mount Aetna for his crimes in "assisting the giants against the gods, so this gigantic cor- "poration of more than one hundred and fifty heads (son of "Somnus and Luna) ought to be buried under poppies in a "cave where the sun never penetrates for warring against "the constitution and common sense.'

"We could not wander so far from the judicial path as to "reply to the venerable chancellor's misapplied apologue "from the most fanciful Grecian poets of old; we have thought "proper to quote it, for publication in our legal report, only as "an illustrative episode to a constitutional argument by a "patriarchal jurist. But, not acknowledging mythology to be "the law nor Hesiod to be authoritative on a question of "political power in Kentucky, we must still adhere to the "opinion in The City of Lexington vs. McQuillan's Heirs, "Somnus and Luna and the poppies and even the cave in ter- "rorem, notwithstanding."

In the City of Louisville vs. Louisville Rolling Mill Company, 3 Bush, 424 (1867), the Court says:

"The right of eminent domain—the right to take private "property for the public use—is a power almost without "limit; but this essential safeguard is thrown around the "owner that the public who wants or needs his property must "compensate him for it. Nor does this in any wise impair "or conflict with the essential right and power of local govern- "ment over communities such as towns or cities, in ordinary "cases, to have the street improved at the expense of the "property holders thereon; for, ordinarily they are most ben- "efited, and it is only requiring them to keep their property "in such condition as not to obstruct or injuriously hinder the

"public; for, legally speaking, each lot owner holds the legal "title to one-half of the street in his front, subject, it is true, "to the public easement; besides, it may ordinarily be, and "generally is, only a fair portion of the tax which may justly "and legally be laid on him, to keep up the streets and public "passways which are so peculiarly beneficial to the realty of "all towns and cities; and, moreover, each proprietor may be "presumed to have purchased in contemplation of the power "in the local authorities to direct him to erect such improve- "ments, as are ordinary and usual."

In the case of Howell, etc., vs. Bristol, etc., 8 Bush, 498, it is said:

"To compel the property owners upon this street to im- "prove and keep it in repair, upon terms similar to those "applied to the owners of property on other streets in the "city, might of itself, be regarded as imposing upon them an "undue proportion of the public burdens. But so long as "such burdens are so imposed as to keep within what may "be legitimately deemed a tax, not a mere spoliation, it is a "hardship against which the courts can afford no relief. Per- "fect equality in the imposition of local taxation cannot be "attained, but uniformity in the matter of assessment and "approximate equality in the amount of exactions, are cer- "tainly within the range of possibility; and such uniformity "and approximate equality were by this Court, in the case of "McQuillan's heirs, held to be essential to the constitution- "ality of such taxation."

In Loeser vs. Redd & Bros., 14 Bush, 20, the Court says:

"One of the provisions of the charter in regard to such "improvements is in substance that the improvement shall "be made at the exclusive cost of the owners of lots in each "fourth of a square to be equally apportioned by the general "council according to the number of square feet owned by "them respectively, etc. Under this provision of the charter, "where the property is bounded on all sides by principal "streets, or the territory is laid off into squares, there is no "difficulty in making the assessment; the charter in such a "case has provided the manner in which the assessment shall "be made and every foot of land within the fourth of a square "must contribute to pay for the improvement. The city "council orders the improvement and the law provides the "mode of assessment and the property to be assessed. In "such cases when a mistake has been made in the assess-

"ment, and a party owning property within the fourth c
"square has paid too much, or been omitted from the ass
"ment or the Council has gone beyond the fourth of a squ
"in making the assessment, the courts have the right to c
"rect the mistake or rectify the error, for the reason that
"law, when the improvement is ordered, creates and fi
"the liability. No discretion is left with the Court or Cou
"as to the party to be charged or as to the property to
"fixed. The chancellor is only enforcing the law by requir
"the property already selected as the subject for taxation
"the particular case to pay it." . . . . . .

In the case of Pearson vs. Zable, 78 Ky., 170 (1879), t
Court holds:

"That the right to make local assessments for local i
"provements is based on the fact that property in close pro
"imity to the improvement derives a peculiar benefit from t
"improvements, has generally been conceded, and we assu
"that such is its basis." (Cooley, Constitutional Limitatio
page 630, 4th Ed., and authorities there cited.)

"But it by no means follows that each piece of prope
"within the bounds over which the assessment extends mu
"in fact, derive benefit from the improvement. The area ov
"which the assessment extends constitutes for the occasi
"a tax district. Whether the property within the district, co
"sidered as an entirety, will be benefited by the proposed i
"provement, is a question to be decided primarily by t
"legislature. And when that department, whether acti
"directly or through the local authorities, to which it m
"have delegated the power to determine when such improv
"ments shall be made, directs an improvement to be mad
"and the cost of making it to be assessed upon adjacent pro
"erty, there is a decision by the legislature that the proper
"within the district will be benefited.

"This decision will generally be final and conclusive upo
"the question of benefits to the district as a whole, and als
"that public convenience demand the improvements to b
"made. Whether there might not be a case in which the al
"sence of benefits and of public necessity for the improv
"ment would be so clear and palpable as to warrant th
"courts in pronouncing the legislative act a mere license fo
"spoliation under the guise of making public improvement
"we need not inquire. It is not claimed that the grading o
"Elizabeth street has not been beneficial to the property as
"sessed to pay for it, when considered as a whole. All tha

"is claimed is that it was not beneficial to the appellant's lot.

"It is impossible so to adjust public burdens of any de-"scription, as to secure perfect equality; all that can be done "is to approximate it, and moreover there must be uniformity "in taxation in all its branches. Not uniformity when con-"sidered with respect to benefits derived from the expendi-"ture of taxes, but uniformity in their imposition."

In the case of Preston vs. Rudd, 84 Ky., 150 (1886), is found the following:

"In considering the question, however, we must look to "the area which constitutes the tax district. The legislature, "or the municipality to which it has delegated authority to "act in the matter, must, from necessity, decide primarily "whether the assessed area or tax district as an entirety will "be benefited by the contemplated improvement; and its de-"cision upon the question, and whether the public need de-"mands an improvement, must be regarded as final, unless "the absence of benefit and public need of the improvement "manifest that it is spoliation, and not legitimate taxation.

"The question of assessment or apportionment cannot be "governed by an advantage or disadvantage to one person "within the district.

"If so, public improvements could rarely be made. The "legislature must necessarily look at the district as a whole, "and upon this general view determine whether such benefits "will accrue from the improvement, as will authorize its cost "to be imposed upon the adjacent property. Such assess-"ments are made upon the assumption that a portion of the "community are specially benefited by the improvement; the "principle is that the territory is benefited; that it has a com-"mon interest, and that governed by equitable rules, it must "equally bear the burden.

"Necessarily, individual cases of hardship will arrive; but "it approaches equality as nearly as is practicable; it follows "that a lot owner may be compelled to pay his proportion of "the cost of an improvement, although in this particular case "his property may not be benefited."

In Barfield vs. Gleason, 111 Ky., 491 (1901), the Court of Appeals considers the question in the light of Norwood vs. Baker. The following is from the opinion:

"In Baptist Church vs. Matee, 8 Bush, 510, the doctrine, together with the constitutional limitation, is thus stated by Judge Lindsay:

"'It is certainly well settled in this state that the cost of "the original construction of streets of a city may be imposed "upon the owners of real estate alone without violating the "constitutional limitations upon the legislative power of tax-"ation . . . In proportion as the trade and population of the "city increases the value of real estate advances. The owners "of such real estate receive and enjoy very nearly the sole "permanent advantage accruing to the city from the con-"struction, repairs and reconstruction of the streets, upon "which that property may be situated. The general public "certainly receives incidental benefits from such improve-"ments, but the benefits to owners of real property are di-"rectly appreciable and permanent. The original improve-"ment enhances the value of lots adjacent to the street im-"proved by making it accessible to the public and attracting "trade and population. (Preston vs. Roberts, 12 Bush, 570; "Nevin vs. Roach, Watson vs. Nevin, 86 Ky., 492.')

"The same doctrine has been again and again affirmed "arising under the new Constitution. (Gleason vs. Harnett, "20 Ky. Law Rep., 694; Gosnell vs. City of Lou., 20 Ky. "Law Rep., 519; McNaghton vs. Louisville Ind. School of "Reform, 19 Ky. Law Rep., 1695.) This question is no longer "an open one.

"While this system of taxation for local assessment pro-"ceeds upon the theory of equivalents, exact compensation "has never been attainable, or even hoped for under any "system yet devised. The question, whether contiguous ter-"ritory would be benefited, and the boundary within which "benefit therefrom is to be presumed has uniformly been "construed to be a matter of legislative discretion, and that "discretion having been exercised with the presumption of "law in favor of its correctness, the courts will not intervene "to disturb the legislative determination except upon a show-"ing of facts, so conclusive, as amply to justify their inter-"ference.

"Upon the authority of the opinion of Mr. Justice Harlan, "172 U. S., 269, an immense volume of argument has been "devoted to the proposition that the Kentucky Statute is "violative of the Fourteenth Amendment to the Constitution "of the United States, in that there is no provision made "by the statute for a preliminary hearing as to the extent "of special benefits to each piece of property resulting from "the improvement.

"An extended consideration of this argument has been "rendered unnecessary by recent decisions of the Supreme "Court of the United States in the cases of French vs. Barber

"Asphalt Pav. Co.; Wormley vs. District of Columbia; "Hoover Allen vs. District of Columbia; Wight, etc., vs. "Davidson, etc.; Tonawanda vs. Lyons, all rendered on the "29th day of April last and to appear in 181 U. S. Reports."

In Pfaffinger vs. Kremer, 24 Ky. Law Rep., 2370; 74 S. W. Rep., 238 (1903), the Court says:

"For appellee it is argued that the test is not whether the "value of the property within the apportionment district is "less than the cost of the improvement apportioned against "it, but whether such proportion of cost of the improvement "is as much or more than the value of the whole lot, of "which the part sought to be subjected to the tax is a parcel. "We cannot agree with this reasoning. The thing taxed is "the designated district, and that alone, nor its owner, nor "is it considered in connection with other property, held by 'the same owners. This must be so, because the true theory "underlying this method of taxation is that the territory "selected and made to bear the tax is the only one presumably "benefited thereby."

In the case of City of Louisville vs. Bitzer, 24 Ky. Law Rep., 2264; 73 S. W. Rep., 1115, it is again decided:

"The method of assessment by the foot has been followed "so long and has been so often approved by this Court, that "it no longer remains an open question. (Preston vs. Roberts, "75 Ky., 570; Nevin vs. Roach, 86 Ky., 492.) The rule also "is that while these assessments rest upon the basis of "benefits, or presumed benefits, to the property assessed, it "is not essential to their validity, that actual enhancement "in value or other benefits to each owner should be shown, "the judgment of the City Council being conclusive as to "the propriety of the improvement. (Pearson vs. Zable, 78 "Ky., 174; Ludlow vs. Trustees, 78 Ky., 360; Preston vs. "Rudd, 84 Ky., 156; Covington vs. Schultz, 16 Ky. Law "Rep., p. 831; Allen vs. Wood, 20 Ky. Law Rep., 61; Bullit "vs. Selvage, 20 Ky. Law Rep., 599.) On the other hand, it "is held that when owing to extraordinary facts, the pre-"sumption on which the rule rests does not apply, and to "force the owner to make the improvement is to confiscate "his property without compensation, this is spoliation and "will not be enforced. (Covington vs. Southgate, 54 Ky., 491; "Louisville vs. Louisville Rolling Mill Co., 66 Ky., 416; "Broadway Baptist Church vs. McAfee, 71 Ky., 508; Preston "vs. Rudd, 84 Ky., 150; France vs. Jacob, 88 Ky., 532; James "vs. Louisville, 19 Ky. Law Rep., 447.")

VII.

The Kentucky authorities have been reviewed at some length in order to fully acquaint this Court with the settled doctrine controlling special taxation in the state. Counsel for plaintiff in error may have left the Court under a misapprehension with the statement that "the legislature in 1893, seven years before the improvement now in question, was made, adopted a general rule," etc. As a matter of fact the general rule under which the present case was decided by the Kentucky Court of Appeals was adopted by the legislature of the state nearer one hundred and seven years ago, and observed in an unbroken line of cases throughout the entire judicial history of the state.

The reference to the Kentucky cases will also serve to convince the Court that rulings of the Kentucky Court of Appeals on the question of spoliation are not so untenable as plaintiff in error would have it appear. Upon an examination of the authorities it will be found that the rule adopted in Kentucky is in perfect agreement with the principles set forth in Norwood vs. Baker, and applied in the determination of that appeal. When a case presents "considerations of peculiar and extraordinary hardships amounting, in the opinion of the Judges of the Court of Appeals, to actual confiscation of private property to public use" the Kentucky law affords ample constitutional protection.

See City of Louisville vs. Bitzer, 22 Ky. Law Rep., 64.
Covington vs. Southgate, 54 Ky., 491.
Louisville vs. Rolling Mill Co., 66 Ky., 416.
Church vs. McAtee, 71 Ky., 508.
Franz vs. Jacob, 88 Ky., 532.

In the case cited by the plaintiff in error, Preston vs. Rudd, 84 Ky., 153, as well as in the many other cases cited above, the Court of Appeals fixed the constitutional limit of taxation and indicated the line of separation between a valid exercise of the taxing power on one hand and spoliation on the other. The conclusion reached was neither illogical or without precedent. It was in keeping both with the previous and subsequent adjudications of the Kentucky courts, and in accord with the announcement of law by a host of cases from other jurisdictions.

The Court of Appeals of Kentucky has always ruled that the Kentucky method of distributing the burdens of local improvements was based on legislative determination of benefits conclusive upon owners and the courts. That the legislature having ascertained the district benefited by the improvement it only remained to apportion the cost equally amongst the property in the district prescribed. That individual property holders could not complain or be heard upon the question of benefit except in those cases where the general doctrine of spoliation could be successfully invoked.

The doctrine of spoliation as applied in Preston vs. Rudd is not confined to special assessments, but is equally potent in every case of taxation, general or special, where constitutional limits are invaded, and a point reached where the conclusiveness of benefit attaching to the legislative distribution of a tax can no longer apply. There is no occasion in the present case for the invocation of the law of spoliation announced by the Kentucky Court of Appeals. The sole issue presented by the answer of the defendant in the State Court was that in this particular case no benefit had accrued to the railroad from the construction of Frankfort avenue. It has never been contended by the plaintiff in error that the district designated by the legislative enactment did not receive ample benefit, nor that the specific lot in controversy would not have been benefited, if otherwise employed than happened to be its use at the time of the improvement and this suit.

The State Court has decided that the finality of the determination of benefit by the legislature denied to the defendant in the State Court the right to be heard on the defense assumed to be presented by its answer.

It is earnestly submitted that there is no contradiction or impropriety in the position taken by the Kentucky Appellate Court and that the settled law of the State is not at variance with either the right or reason of the situation.

VIII.

In Walston vs. Nevin, 128 U. S., 578, this Court, under a writ of error to the Kentucky Court of Appeals, was called upon

to consider the application of the Fourteenth Amendment of the Constitution of the United States to the Statutes of Kentucky governing special assessment. The statute quoted by Mr. Chief Justice Fuller in his opinion will be found upon examination to be the same statute as here on review. (See appendix.) After a reference to the Kentucky authorities construing the statute and the case of Davidson vs. New Orleans, 96 U. S., 97, this Court said:

> "The conclusion was reached that neither the corporate "agency by which the work is done, the excessive price which "the statute allows therefor, nor the relative importance of "the work to the value of the land assessed, nor the fact that "the assessment is made before the work is done, nor that "the assessment is unequal as regards the benefits conferred, "nor that personal judgments are rendered for the amount "assessed, are matters in which the State authorities are con- "trolled by the Federal Constitution. So the determination of "the taxing district and the manner of apportionment are "all within the legislative power. Spencer vs. Merchant, 125 "U. S., 345; Stanley vs. Supervisors, 121 U. S., 535, 550; "Mobile vs. Kimball, 102 U. S., 691; Hagar vs. Reclamation "District No. 108, 111 U. S., 701; United States vs. Mem- "phis, 97 U. S., 284; Laramie County vs. Albany County, "92 U. S., 307. And whenever the law operates alike on all "persons and property, similarly situated, equal protection "cannot be said to be denied. Wurts vs. Hoagland, 114 U. "S., 606; Railroad Company vs. Richmond, 96 U. S., 521, "529. The remedy for abuse is in the State Courts, for, in the "language of Mr. Justice Field, in Mobile vs. Kimball, 'this "Court is not the harbor in which the people of a city or "county can find a refuge from ill-advised, unequal and op- "pressive State legislation.'
>
> "As the question raised in these cases is a Federal ques- "tion (Spencer vs. Merchant, supra), we will not sustain the "motions to dismiss; but as there was, in our judgment, "color for those motions, and the contention now made has "often been pressed upon our attention before, and as often "determined adversely, so that the rule must be regarded as "settled, we shall grant the motions to affirm."

IX.

The plaintiff in error attempts to differentiate its case and to invoke a special rule by allegation of its answer and argu-

ment of its counsel, to the effect that the Louisville & Nashville Railroad owns only a right of way on and over the property involved in the assessment. A fallacy fatal to the contentions of plaintiff in error is here to be noted.

The assessment laws of Kentucky and the municipal council of Louisville have not assumed to tax or hold liable the right of way or easement of the railroad company. The Statutes of Kentucky governing local taxation provide that the apportionment of the cost of a local improvement shall be made upon *lots* in the quarter squares binding upon the street improved. The name of the owner or the occupant of the lot is set forth in the apportionment for no other purpose than designating the real estate liable to respond for the tax imposed. The proceeding is entirely one in rem, out of which there results and can result no personal liability upon any person or corporation. The Louisville & Nashville Railroad Company is mentioned in the apportionment only for the purpose of describing with greater accuracy the lot of land charged by the assessment with its proper proportion of the cost of constructing Frankfort avenue.

It cannot alter the system of special taxation laid down by the Legislature of Kentucky that upon a portion of the land within the tax district the Louisville & Nashville Railroad owns an easement or exercises certain rights. If it be true that the plaintiff in error has nothing more than a dominant easement in the lot of land assessed in the construction of the street, then the servient estate must also pass in order to vest an absolute title in any purchaser at a sale of the property ordered by court in the enforcement of the tax lien. It cannot be that plaintiff in error is concerned with the question of whether or not the owner of the servient estate is before the court and his interest in the property affected by the judgment. Certainly the Louisville & Nashville Railroad cannot claim exemption from assessment in behalf of the lot upon which its right of way exists simply because the owner of the servient estate may not be before the Court.

An examination of the apportionment made by the council, the petition filed by the contractor, and the judgment rendered by the Court, show conclusively that only the *lot* of land specifically described by metes and bounds is sought to be held liable in these proceedings.

The Court of Appeals of Kentucky adjudged that the particular use to which a lot of land may be employed cannot determine its liability or its exemption from liability in the matter of special assessments.

> "The strip of land used by the railroad company the day "before it was appropriated by it as a right of way was a lot "in the meaning of the statute, and to thus appropriate it "cannot change its character." (R. 70.)

The roadbed and tracks of the Louisville & Nashville Railroad removed tomorrow will leave a lot within the meaning of the statute, and beyond dispute subject to taxation. Then is it to be argued that the mere presence of the Louisville & Nashville Railroad upon or in connection with real estate works a transformation of a lot into a metaphysical something, neither land nor personalty? To follow the argument of plaintiff in error must lead to this legal legerdemain.

There is no justification in law or morals for the conclusion that a special use of land by a railroad produces other and different results than real estate peculiarly employed by other commercial enterprises.

A manufacturing establishment may purchase of the owner of real estate a perpetual right to occupy the premises for certain designated purposes. It would not be contended that such a division of the title to the estate would avoid all special assessments. Property in a residence district might be the subject of a transaction resulting in the purchase of a perpetual right to employ the ground for residence purposes. But the lot would still continue to exist and be liable for the cost of local improvements. Leases of long duration, contemplating the entire benefit and use of real estate, are of frequent occurrence, but have never been held to work the removal of the land involved from the domain of the tax gatherer.

Nor is it true that the immediate, instant use of property determines whether it has been benefited by adjacent local improvements. In this connection the court should keep in view the important feature of the assessment laws of Kentucky, that property is only liable for the original construction of streets and alleys. All repairs and reconstruction of every kind and when-

ever occurring, are paid for by the municipality out of the general taxes levied on every species of property, so that a lot of land escaping the cost of the original construction of a street can never again be charged with a special tax on account of a second improvement of the highway.

In considering benefits determined by the legislature to result from local improvements, the Court looks beyond the conditions which surround the land at the time the construction is made and the assessment levied. Original construction of streets and alleys must necessarily occur in those portions of the municipality recently annexed and in a measure sparsely settled. Highway improvements are always in advance of population and business, and in most cases the future brings that enhancement in the value of adjacent property, which renders so pre-eminently just the area and frontage scheme of local taxation. The fact that in 1900 the lot of land then occupied by the roadbed and tracks of the Louisville & Nashville Railroad did not receive a benefit to be measured at that time in an amount equal to or in excess of the cost apportioned against the property, would be a poor standard by which to declare the assessment wanting in equity and justice. Today a freight and passenger depot may be constructed upon some portion of the lot affected by the assessment, and benefits of multiplied proportion result to the territory assessed. Within a decade, the present use of the land may be abandoned, and residences or business houses constructed upon the lot, which would receive from the street improved, benefits beyond any tax that has resulted from the improvement of the thoroughfare.

The real estate can at no future time be asked to contribute for the construction of the street, and all prospective benefits must now or never be taken into contemplation in adjudging the validity or invalidity of the present tax.

X.

Under the aspect of the case as presented by plaintiff in error, the decision of the Kentucky Appellate Court should not be reviewed or reversed.

The contention of counsel for plaintiff in error that the per-

petual right of way of the railroad is not property to be taxed under the Kentucky law of special assessments, does not present a question determinable in this Court. The decision of the Court of Appeals of Kentucky respecting this phase of the litigation did nothing more than place a construction upon the Statue of Kentucky in defining what was meant by the terms "lot," "property" and "square feet owned," as used in the provisions governing local improvements.

Such construction will be adopted by this Court if the legislature might rightfully have done what the interpretation of the State Court says it did.

Commercial Bank vs. Buckingham, 5 How., 326.

Murray vs. Gibson, 15 How., 423.

Guthrie on Fourteenth Amendment, page 44.

The Court of last resort in Kentucky has ruled, according to the position of opposing counsel, that a perpetual easement in property is subject to special taxation under the statutes of the state. As an original proposition this Court might hold otherwise. But the mere definition of the terms "lot," "property" and "square feet owned" so as to include the holdings of the Louisville & Nashville Railroad does not violate any provision of the Fourteenth Amendment. The plaintiff in error in purchasing its right of way and locating its roadbed must be presumed to have known that under the Kentucky assessment laws, its property would be subject to local taxation.

In Turner vs. Commissioners, 173 U. S., 461, this Court reviewed a judgment of the Supreme Court of North Carolina, holding that certain bonds issued by the County of Wilkes were void, by reason of the unconstitutionality of the law under which they were issued. The Court, by Mr. Justice Peckham, said:

> "This being a writ of error to a State Court, we cannot "take jurisdiction under the allegation that a contract has "been impaired by a decision of that Court, when it appears "that the State Court has done nothing more than construe its own Constitution and statutes existing at the time when "the bonds were issued. We are, therefore, bound, by the "decision of the State Court in regard to the meaning of the "constitution and laws of its own state, and its decision upon "such a state of facts raises no Federal question."

In Missouri, etc., R. Co. vs. McCann, 174 U. S., 580, it is held: "The elementary rule is that this Court accepts the interpretation of the statute of a state, affixed to it by the court of last resort thereof."

Sioux City Trust Co. vs. Trust Company, 172 U. S. 642.
Merchants' Bank vs. Pennsylvania, 167 U. S. 461.
Morley vs. Lakeshore Co., 146 U. S. 162.
Board vs. Louisiana, 179 U. S. 622.
Arnt vs. Griggs, 134 U. S. 316.

XI.

Meeting the plaintiff in error on its own ground, it is submitted that the perpetual right of way of the Louisville & Nashville Railroad Company was taxable in this case. The company owned and held the land as its absolute, exclusive property. No attempt was or will be made to find a servient estate to show that the road held only a dominant easement. The vague, indefinite possibility of reversion in some unknown and unknowable person is certainly not property to be alone taxed for the cost of the street. Such being the case, unless the real estate has ceased to exist, the railroad must own property as contemplated by the statute.

"The words employed in the deed express absolute dominion and complete enjoyment. These constitute property and all that is understood in proprietorship." Caldwell vs. Fulton, 21 Pa., 763.

Judge Brewer, in Keener vs. Union Pacific, 31 Fed. Rep., 128, said:

"The term 'right of way' has a twofold significance. It "sometimes is used to mean the mere intangible right to "cross; a right of crossing; a right of way. It is often used "to indicate that strip which the railroad company appro-"priates for its use and upon which it builds its roadbed. "Obviously, the term in the statute in this case has the lat-"ter significance, and taxation is to be upon that strip, as-"sessed at its full cash value, which the railroad company

"has appropriated and is using as its right of way, and upon "which, to its entire width, it has placed its tracks and side "tracks."

In Kentucky it has never been held that the fee is alone taxable. Thus a life tenant must pay the cost of public improvements assessed against his lot. Hackworth vs. Artificial Stone Company, 20 Ky. L. R., 1789. Charitable institutions, vested only with the use of property during a prescribed time and for a definite purpose have always been required to meet the burdens of local taxation.

The previous rulings of the Kentucky Court of Appeals on the question of assessment of railroad rights of way are indicated in the opinions of Railroad Company vs. Obst and Stengel, decided February 18, 1875, and City of Ludlow vs. Southern Railroad, 78 Ky., 357. The following quotations from the above cases are found in the Ludlow opinion:

"Real property held by railroad companies within the cor- "porate limits of the city of Louisville is not exempt from "street taxation. The terms of the grant of the power to tax "for such purposes included all real estate, and that held by "railroad companies, like that held by churches, colleges and "hospitals, and other institutions of like character, must bear "its proportion of local burden. There is no constitutional "restriction upon the power of the legislature to impose local "taxation upon railroad companies. It is a mere question of "policy.

"The rulings of the Court of last resort in other states are "almost uniformly in accord with the decision of this Court "upon this question.

"In the City of Chicago vs. Baer (41 Ill., 306), it was held "that a street railway was subject to assessment for the im- "provement of the street on which it was located.

"In the Northern Indiana R. R. Co. vs. Connelly (10 Ohio "State, 164), it was held that the roadbed was assessable for "the street improvement, notwithstanding the fact that the "company derived no benefit from the improvement of the "street.

"In the B. & M. R. R. Co. vs. Spearman (22 Iowa, 112), "the depot grounds were held to be subject to assessment for "street improvement.

"To the same effect are the cases of City of New Haven "vs. Fair Haven & Westville R. R. Co., 38 Conn., 422; Street "Railway Appeal, 32 Cal.; State vs. Newark, 3 Dutcher (N. "J.); Taylor vs. Palmer, 31 Cal.; Drainage Co. Case, 11 La. "Ann.; Emery vs. Gas Co., 28 Cal.; State vs. New Brunswick, "1 Vroom; and Orance & Alexander Railroad Co. vs. the "City of Alexander, 17 Grattan.

"We think that, both upon reason and authority, a lot held "and owned by the railroad company as this is held and used, "is as much subject to assessment for street improvements "as if it belonged to a natural person. In the law authorizing "the assessment there is no exemption of railroad property, "nor exemption of property because of its application to cer- "tain uses."

The weight of authority in other states seems to be in keeping with the rulings of the Kentucky Appellate Court. A brief mention of decisions elsewhere is here made only to exhibit the trend of the decisions. The citations will also serve the purpose of emphasizing our contention that there is present in the record no constitutional question; the only controversy being the property interpretation of the assessment laws of the state.

In the case of Cicero vs. Chicago R. R. Co., 176 Ill., 501, the Court reviews a great number of cases decided by the Supreme Court of Illinois, and concludes as follows:

"Under the cases cited, we regard the question settled that "a street railway occupying a public street is liable to be as- "sessed for a local improvement in the same manner as other "property owners."

In Indianapolis & V. R. R. Co. vs. Capitol Paving & Const. Co., 54 N. E., 1076, the Indiana Appellate Court defines the term "lot" as employed in a statute providing for special assessment and its application to a railroad right of way.

"It is further argued that the assessment is void because "appellant's right of way is not 'lands or lots' within the "meaning of the charter. A railroad company has an ease-

"ment in grounds occupied by its tracks. An easement
"an incorporeal right created by grant, and always carr
"with it an interest in the land in or over which it is to
"enjoyed. 2 Minor Inst., 20 et seq. In some jurisdictions
"is held that a street assessment cannot be enforced agai
"a railroad's abutting right of way, because it is not land, a
"because public policy forbids the severance of the seve
"parts essential to the use and operation of the road. S
"Chicago, M. & St. P. Ry. Co. vs. City of Milwaukee,
"Wis., 506, 62 N. W., 417. But it has been held in this sta
"that the right of way of a railway company abutting up
"or bordering upon a street may be assessed for the improv
"ment of the street. Railroad Co. vs. Hanna, 68 Ind., 56
and cases there cited; Railroad Co. vs. Hays, 17 Ind. Ap
261, 44 N. E., 375; 45 N. E., 675, and 46 N. E., 597. See al
Paterson & H. R. R. Co. vs. City of Passaic, 54 N. J. La
340; 23 Atl., 945."

In Paterson R. R. Co. vs. City of Passaic, 54 N. J. Law, 34
is found the following:

"The cases of New Jersey R. Co. vs. City of Elizabeth,
"Broom, 330, and Jersey City ads. New Jersey Midland Ra
"road Co., 13 Ib. 97, are authority for the proposition th
"the roadbed of the railroad company is property legally su
"ject to assessment for municipal benefits."

The rule to be gathered from the collected adjudications o
the subject is laid down in Smith on Modern Law of Municip
Corporations, Sec. 1239, in this language:

"Where the statute authorizes assessment for local im
"provements against abutting property, the right of way
"a railroad company is assessable; and it need not be mad
"against the right of way as an entirety, but may be agains
"that part only which fronts on the improvement. A railroa
"right of way parallel to a street may be specially assesse
"for local improvement; but not where it is across the stree
"and so may lands used for a depot, warehouse, roundhous
"and shops."

The case of Illinois Central Railroad Company vs. Decatu
147 U. S., 190, is an expression of opinion by this Court on a
points raised in the present case. To defray the cost of gradin
and paving a street in the City of Decatur, two parcels of lan

forming part of the right of way of the Illinois Central Railroad were assessed in the amount of $262.70. The road claimed an exemption from all taxation under its charter from the General Assembly of Illinois. Mr. Justice Brewer, in stating the opinion of the Court, deals extensively with the theory and principles upon which special assessments are sustained. The conclusion reached was that the right of way of the railroad was not exempt, as the assessment was made on the idea of benefit, and this feature of the tax removed the case from the terms and provisions of the company's charter. It would appear that a proper analysis of the opinion in Illinois Central Railroad vs. Decatur renders it controlling upon the questions here in issue. The same considerations that moved the Court to deny the contentions of the railroad company in the case cited apply with equal force in the present submission.

The following from Cooley on Taxation is quoted with approval by the Court.

> "As in the case of all other taxation, it may sometimes "happen that the expenditure will fail to realize the expec- "tation on which the levy is made; and it may thus appear "that a special assessment has been laid when justice would "have required the levy of a general tax; but the liability "of a principle to erroneous or defective application can not "demonstrate the unsoundness of the principle itself, and "that which supports special assessments is believed to be "firmly based in reason and justice."

A large number of cases bearing upon the same doctrine is referred to in the opinion to show that the reasons underlying special assessments would not permit the Illinois Central Railroad to escape such burdens under the exemption set forth in its charter. The Court therefore concludes in this language:

> "There was nothing in the terms of that contract to pre- "vent the State from committing the final determination of "the question of benefits to the city council rather than "leaving the matter of ascertainment to a jury. And "whether the charges are called special taxes or special assess- "ments, and by whatever tribunal or whatever mode the "question of benefits may be determined, the facts remain

" that the charges are for a local improvement, and cast upon
" the contiguous property, upon the assumption that it has
" received a benefit from such improvement, which benefit
" justifies the charge. The charges here are not taxes proper,
" are not contributions to the State or to the city for the pur-
" pose of enabling either to carry on its general administration
" of affairs, but are a charge only and specially for the cost
" of a local improvement, supposed to have resulted in an
" enhancement of the value of the railroad company's prop-
" erty."

Illinois Central Railroad Co. vs. Decatur goes farther than the decision of the Court of Appeals in the case at bar. The conclusiveness and finality attaching to the action of a legislature in determining benefits is carried to the point of preventing a special assessment on the railroad right of way from coming within the exemption granted against " all taxation of every kind."

Plaintiff in error invokes a decision to the effect that the legislative ascertainment of benefit is not conclusive or final in any way or for any purpose.

XII.

The cases referred to by opposing counsel are not numerous, and simply evidence a difference of opinion as to the proper construction of assessment statutes. In two of the cases cited in support of the position taken by plaintiff in error, it is expressly stated that "Kentucky, New Jersey, Illinois, Ohio, California and Indiana hold that under the statutes of those States the right of way of a railroad is assessable for local improvements." Railroad vs. Milwaukee, 87 Wisc., 517; Railroad vs. City of Ottumwa, 112 Iowa, 304.

This Court would not sanction the argument of plaintiff in error if a corporation in another line of business should present it in an effort to escape a local assessment. A merchant, a manufacturer or a warehouseman, instead of taking a fee simple title to real estate, might have granted a perpetual user to property for purposes necessary to the transaction of business. Then by showing that the improvement of a highway did not add to profits (hauling being done from another door and over another street) and further representing that only a right of way in the

property was held, all burdens of local taxation could be avoided. This is a sure and certain deduction from the argument of counsel for plaintiff in error, and in its manifest unsoundness is presented a complete answer to the contentions made.

It would seem that no property in the community ought in fairness and as a matter of common sense contribute more certainly to the cost of street improvements than a railroad, regardless whether the property taxed be a freight depot, a passenger station or a right of way adjacent to such depot and station.

The proper view of this case presents only the question:—does the lot of land now used by the plaintiff in error enjoy special exemptions from taxation on account of L. & N. occupancy? In other words, does the use of property on the day of assessment settle for all times its liability for local improvements?

The Kentucky Courts have held in the negative and we ask that their judgment be affirmed.

Respectfully,

A. E. RICHARDS,
City Attorney of Louisville.

BENJAMIN F. WASHER,
WILLIAM FURLONG,
For Barber Asphalt Paving Co.

APPENDIX.

The Statutes of Kentucky regulating special assessments for the costs of local improvement were in 1900 (and still remain in so far as this case is concerned) as follows: The sections quoted are portions of an act of the Kentucky Legislature, entitled, "An Act for the Government of Cities of the First Class," and are to be found in a compilation, officially termed, Kentucky Statutes:

PUBLIC WAYS.

Section 2832. Public Ways—Improvements—Meaning of Terms. Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways and thoroughfares. Improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done as may be prescribed herein.

Section 2833. Original Construction—Cost—Square Defined—Territory Not Defined—Wells and Cisterns—Lien. When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Board of Public Works according to the number of feet owned by them respectively, and in such improvements the cost of the curbing shall constitute a part of the cost of the construction of the street or avenue, and not of the sidewalk. Each subdivision of the territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth on both sides fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively, within the depth, as set out in the ordinance. The general council shall have power by ordinance, recommended by the board of public works, to cause the digging and the walling of public wells and cisterns,

and the placing of water plugs and fire hydrants and attachments to street water pipes in the public ways, and to apportion the cost thereof exclusively against the owners of lots fronting the public ways to the middle of each square from the intersection at or near which the work shall be located, according to the number of square feet in such lots, or in any other equitable mode of apportionment which the general council may prescribe by ordinance, and lien shall exist against such lots for the respective apportionments by the board of public works, of the cost of digging and walling of public wells and cisterns, and the placing of water plugs and fire hydrants and attachments to street water pipes, with interest from the date of the apportionment at the rate of six per cent. per annum until paid.

Section 2834. Lien for Cost of Constructing Public Ways, Sidewalks, Wells and Cisterns—Passage of Ordinance. A lien shall exist for the cost of original improvement of public ways, for the construction and the reconstruction of sidewalks, and for the digging and walling of public wells and cisterns, for the apportionment and interest thereon at the rate of six per cent. per annum against the respective lots. Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned; and in no event, if such improvement be made, as is provided for, either by ordinance or contract, shall the city be liable for such improvement, without the right to enforce it against the property receiving the benefit thereof; but no ordinance for any original improvement mentioned in this act shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other.

Section 2835. Sidewalks and Curbing—Apportionment of Costs. The cost of making sidewalks, including curbing, whether by original construction or reconstruction, shall be apportioned to the front foot, as owned by the parties respectively fronting

said improvement, except that each corner lot shall pay the cost of its sidewalk intersection.

Section 2836. Property Owners Permitted to Improve Public Ways. —The board of public works may, in its discretion, upon a petition of a majority of the property owners on the part of the public way proposed to be improved, grant them permission to improve said public way, under the supervision of and within such time as may be fixed by the board of public works.

Section 2837. Inspection and Reception of Work—Publication of Notice. When improvements in public ways have been made, or public wells or cisterns dug and walled, and the contract therefor completed, the board of public works shall, by one insertion in one of the daily newspapers published in the city, give notice of the time and place fixed for the inspection and reception of the work by the board, or its deputy or deputies, and such owners, their agents, and representatives, may appear and be heard as to whether such improvements have been made in accordance with the ordinance authorizing the same, and the contract therefor.

Section 2838. Action to Enforce Lien—Evidence—Provision for Redemption. In all action to enforce liens, a copy of the ordinance authorizing the improvements or work, a copy of the contract therefor, and a copy of the apportionment—each attested by the comptroller—shall be prima facie evidence of the due passage, approval, and publication of the ordinance, of the due execution and approval of the contract, and shall also be prima facie evidence of every other fact necessary to be established by the plaintiff in such actions to entitle him to the relief authorized to be given in this act. In such actions the court shall provide, in its order confirming any report of sale, that the defendants, or either of them, or any one claiming through or under them, or either of them, or any creditors of theirs, or either of them, may, within two years from the date of such order confirming a report of sale, redeem the land sold by paying to the purchaser the purchase price, with interest thereon from the day of sale, at the rate of six per cent. per annum, and all the taxes and assessments on and against

such land paid by such purchaser, with interest thereon at the rate of six per cent. per annum from the date of such payments; and in the event that there be no redemption within the time allowed, the order of confirmation shall be final, and a deed shall be executed to the purchaser or his assignee.

Section 2839. Apportionment Warrants—Registration—Lien. The board of public works shall make out all apportionment warrants for which liens are given for improvements of public ways, wells, cisterns, water plugs, and sidewalks as may be required by ordinance, and within two days thereafter shall enter the same upon a register kept in alphadetical order for that purpose. When the holder of said warrant shall have obtained payment he shall notify the board of public works, and it shall be marked upon the register as paid. The lien shall exist from the date of the apportionment warrant; but a lien shall not be valid against a purchaser for valuable consideration without notice, unless it shall be so entered and registered within ten days of the issuing of the apportionment warrant.